

**Audubon Health Care Center and United Labor
Unions, Local 100. Case 15-CA-8220**

25 October 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 21 December 1982 Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order only to the extent consistent herewith.

The judge found that the Respondent discharged employees Maggie Craft, Regina Rocker, Inez Boykin, Zelda Railey, and Julia Boutte because of their concerted attempts to air mutual complaints to Respondent about working conditions at its facility and that, by doing so, the Respondent violated Section 8(a)(1) of the Act. We disagree. Rather we find that the alleged discriminatees were engaged in a partial strike and therefore their activities were not protected and their discharges were lawful.

Briefly, the credited facts are as follows: Respondent operates a nursing home in New Orleans. The facility is divided into three patient care stations. Craft, Rocker, Boykin, Railey, and Boutte worked in Station 3 as nurses aides. Station 3 is under the overall direction of Supervisor Yvonne Pfiffner.

During the 2- or 3-week period preceding 1 June 1981, employees complained at different times to then Director of Nurses Lou Gaspard² and Supervisor Pfiffner about working conditions at Respondent's facility. Among the complaints raised was the problem of working short; i.e., working with less than a full complement of aides such that the aides were required to handle more patients.³

¹ Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² At the time of the hearing Gaspard held the position of administrator and trainer.

³ This situation apparently usually arose because one or more aides did not work when scheduled to do so.

On 1 June 1981 Gatlin, one of the seven nurses aides assigned to work in station 3 on the 3 to 11 p.m. shift, left work at 4:30 p.m. because she was not feeling well. After she left, at least four nurses aides, including Boutte, Railey, Boykin, and Janey Harvey, without receiving any specific directions to do so helped cover the section left open by Gatlin while continuing to cover their own sections. They did so through dinner. After dinner, the nurses aides cleaned up, and each took care of the patients in her own section. In addition, Boutte took care of the open section and its patients. When finished, aides Boutte, Railey, Boykins, Rocker, and perhaps others took a break. During the break, the nurses aides decided they were not going to work in the open section. They conveyed their decision to the LPN on duty, Barbara Brooks, and, according to Brooks, requested to speak to Gaspard. Brooks relayed the aides' demands to Pfiffner, who, in turn, told Brooks to divide the open section among the remaining nurses aides. Brooks conveyed Pfiffner's assignment to the aides, but was again told they were not going to work in the open section.

Upon being informed by Brooks that the aides refused to do their assignments in the open section, Pfiffner walked over to where the aides were standing and told them to return to work. Craft, however, informed Pfiffner that the aides were not going to work in the open section and that she was only going to take care of the patients in her own section. Boykin then told Pfiffner that she too would only take care of the patients in her section. Pfiffner then asked the aides if one of them would help her put one of the patients from the open section to bed. Harvey agreed to help.

Thereafter, Pfiffner contacted Gaspard by phone to inform him of the situation. Several of the aides and Brooks, the LPN, also spoke with Gaspard on the phone. At the end of the conversation, Gaspard told Brooks that, if the aides would not go to work, she should "Fire them, get rid of them" and that he would be at the facility in a few minutes. Brooks passed on Gaspard's message to the aides who responded they were going to wait for Gaspard. While they waited, the aides returned to their normally assigned sections to put patients to bed for the night.

Gaspard arrived at the facility at approximately 9:30 p.m. There he met with Brooks and the aides at the nurses desk at Station 3. Pfiffner also joined the group, bringing with her the reprimands which she had prepared after her initial telephone conversation with Gaspard. At that time the nurses aides aired their grievances including those concerning having to "work short." Gaspard told the employ-

ees to "either go back to work or get your tails out." An argument ensued among those present over, inter alia, Gaspard's demand that the aides leave the facility. At one point, Gaspard walked away and returned with the employees' timecards. Gaspard then laid the timecards on the table and directed employees to either return to work or punch out. Craft responded, "We don't want to go home. We just want to talk to you about working conditions." Gaspard then told the employees once more to punch out and go home. The aides then just stood there, without making any movement toward either returning to work or leaving. Gaspard left and telephoned the police.

Gaspard returned accompanied by two policemen. The employees told the police what had transpired and that they wanted to talk to Gaspard about these matters. After some discussion over whether the employees were being fired, Gaspard fired the employees. Upon being told by the police that they would have to leave Respondent's facility, the employees did so.

Later, a hospital administrator, White, met with all the alleged discriminatees to discuss the events of that evening. Thereafter, by letters dated 11 June 1981, White notified the employees that he concurred with their discharge by Gaspard on 1 June.

Discussion

A concerted stoppage of work by employees is not protected under Section 7 of the Act if it is conducted in an improper manner.⁴ A partial strike, in which employees refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises is a method of striking which is not condoned by the Board.⁵ Thus, employees participating in a partial strike are not engaged in protected activities.⁶

The judge, while acknowledging that the conduct of the nurses aides could be viewed as a partial strike, rejected that view as too mechanical and simplistic, concluding that it ignored the day-to-day working realities at the Respondent's facility. In his opinion, working in the open section constituted extra work which the aides were not required to perform as part of their normal work duties. Citing *Marlene Industries*, 255 NLRB 1446 (1981), he found that, because they were willing at all times to perform their normal duties, their refusal to perform the extra work did not constitute a partial work stoppage and was, consequently, protected by the Act.

The judge's factual findings and the record as a whole, however, undermine his finding that covering an open section was extra work and therefore not a part of the duties of the nurses aides. Although working in open sections was only sporadically required of the aides, the judge found that aides have regularly covered sections left open by the absence of other aides. Whether this coverage first developed through the aides acting of their own volition, as found by the judge, or through assignment, as claimed by the Respondent, it is clear that it became a practice so routine that no formal assignment was needed: both the aides and their supervisors assumed that the former would cover the open section. Indeed, the judge found that "this practice was well known to and accepted as standard practice by Pfiffner." That the aides came to dislike the practice (if they ever approved of it), and frequently complained about it, did not make it any the less a practice or a part of their job. In this regard, the duties and responsibilities involved in covering the open section were the same as those entailed in the aides' normal assignments. Only the amount of work that they were required to perform increased, and that increase was the result of events beyond the Respondent's immediate control. In such circumstances, we conclude that working in a section left open by absenteeism is akin to an unforeseen expansion of the workload rather than an assignment of a new job duty, as was the situation in *Marlene Industries*, the case relied on by the judge.⁷

Having concluded that covering open sections was part of the nurses aides' job duties, we find that the aides were engaged in a partial strike when they refused to work in the open section. Thus, they did not completely walk off the job. Nor did they refuse to perform any of their other duties until their complaints concerning open section assignments were resolved. Indeed, the evidence is to the contrary. While waiting for Gaspard to arrive at the Center, and contemporaneous with their refusal to work the open section, they put to bed the patients in their normally assigned sections. Even after Gaspard's arrival they did not extend their re-

⁷ In *Marlene Industries*, the employees, pressers of slacks, refused to carry out an assignment theretofore never required of them, i.e., to inspect, without compensation in their production earnings, a full bundle of slacks for defective pressing in their own work. This change resulted in a loss of compensation for the pressers. Moreover, these employees had engaged in similar protests in the past without discipline. Thus, unlike the situation here, the work employees refused to perform in *Marlene Industries* had never been done in the past by them and was not within the scope of their duties.

Chairman Dotson and Member Hunter agrees that *Marlene Industries* is distinguishable on its facts from the instant case. However, their agreement in this regard should not be construed as indicating agreement with the ultimate holding of *Marlene Industries*.

⁴ *First National Bank of Omaha*, 171 NLRB 1145, 1149 (1968).

⁵ *First National Bank of Omaha*, supra at 1149.

⁶ *Honolulu Rapid Transit Co.*, 110 NLRB 1806 (1954).

fusal to cover the open section to their other duties, but remained willing from all accounts to provide care for the patients in their own sections. Finally, they refused to leave the premises until told to do so by the police.

While employees may protest and ultimately seek to change any term or condition of their employment by striking or engaging in a work stoppage, the strike or stoppage must be complete, that is, the employees must withhold all their services from their employer. They cannot pick and choose the work they will do or when they will do it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters and is unprotected.⁸ Here, employees Craft, Rocker, Boykin, Railey, and Boutte chose to dictate the work they would or would not perform when they refused to work in the open section while standing ready to take care of patients in their own section. By such conduct they were attempting to usurp Respondent's prerogative to assign work while expecting to be paid for the work they remained willing to perform. Consequently, they were engaged in a partial strike, their conduct was not protected by the Act, and their discharge for such activity was not unlawful.

We reverse the judge and shall dismiss the complaint.

ORDER

The complaint is dismissed.

⁸ *C. G. Conn. Ltd. v. NLRB*, 108 F.2d 390 (7th Cir. 1939); *Vic Koenig Chevrolet*, 263 NLRB 646 (1982); *First National Bank of Omaha*, supra at 1149.

DECISION

STATEMENT OF THE CASE

PHILIP P. McLEOD, Administrative Law Judge: On June 29, 1981, a charge was filed in the above-captioned case against Audubon Health Care Center, herein called Respondent, by United Labor Unions, Local 100. On July 28, 1981, a complaint and notice of hearing issued alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging employees Maggie Craft, Regina Rocker, Inez Boykin, Zelda Railey, and Julia Boutte because of their participating in protected concerted activities with each other and with other employees for their mutual aid and protection.

In its answer to the complaint, Respondent admitted certain allegations, including the filing and serving of the charge, its status as an employer within the meaning of Act, and the fact that it discharged the individuals named above. Respondent denies, however, that the reason for discharging these individuals was because of

their having engaged in activities protected by the Act, and Respondent denies having engaged in any conduct which would constitute an unfair labor practice.

A trial was held before me on June 10 and 11 and July 19, 1982, in New Orleans, Louisiana, at which all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the close of the trial, counsel for the General Counsel availed himself of the opportunity to argue orally. Thereafter, Respondent filed a brief with me which has been duly considered.

Upon the entire record in this case, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Audubon Health Care Center, herein called Respondent, is a Louisiana corporation which operates a nursing home in New Orleans. During the past 12 months, a representative period, Respondent derived gross revenues in excess of \$100,000 and purchased and received goods and materials valued in excess of \$50,000 directly from entities located inside the State of Louisiana, which entities purchased said goods and materials directly from points located outside the State of Louisiana.

I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. Allegations and Issues

Counsel for the General Counsel contends that employees Maggie Craft, Regina Rocker, Inez Boykin, Zelda Railey, and Julia Boutte were discharged by Respondent as a result of engaging in a concerted effort to air mutual complaints to Respondent about working conditions at its facility. Respondent does not deny that employees engaged in a concerted attempt to air such grievances. It argues that the discharge of these individuals resulted not from those efforts, but from their having engaged in a partial, and thus unprotected, work stoppage, and from their seizing control of Respondent's facility until being evicted by police.

B. Background

The employees at Respondent's nursing home work one of three shifts: 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m. The facility is divided into three patient care areas. This case relates to events in station 3 on the 3 p.m. to 11 p.m. shift. Patients in station 3 are mostly bed or chair-bound individuals who require considerable attention. On the 3 p.m. to 11 p.m. shift, Station 3 is under the overall direction of supervisor Yvonne Pfiffner. Working under her supervision are one licensed practical nurse and several nurses aides. Station 3 is subdivided into seven sections, which is also the normal complement of nurses aides. The licensed practical nurse, hereinafter LPN, is responsible for making out the work schedules of nurses aides, giving medication to patients

where necessary, and providing other assistance where possible on the shift. Duties of the nurses aides are to clean patients, change their bedding and clothing, and feed patients.

During the 2- to 3-week period preceding June 1, 1981, various employees complained at different times to Director of Nurses Lou Gaspard¹ and Supervisor Pfiffner about working conditions at Respondent's facility. Gaspard admitted that, during this period, employees complained at different times about supplies, equipment, unsanitary conditions, a lack of disposable medical gloves to be worn by aides when cleaning patients, and Gaspard's lack of communication with employees. About a week to 10 days prior to June 1, employee Maggie Craft spoke to Gaspard about these and other subjects, including a shortage of pads and the problem of "working short." Pads are used to place under a patient to prevent urine and body wastes from being absorbed by bedding material. "Working short" referred to the frequent shortage of aides such that the aides who did report for work were required to handle more patients. Regarding both the shortage of pads and "working short," Gaspard told Craft that Respondent met the minimum standard set by the State of Louisiana, and Gaspard did not think that Respondent fell short in its service. Gaspard told Craft that the pads were a convenience to patients provided at the expense of Respondent, that Respondent was not required by the State to provide pads, and that several other nursing homes in New Orleans only provided an undersheet for the patient. Gaspard told Craft that pads were provided so that nurses aides handling the patients would not have to change the entire bed everytime a patient was changed. Regarding the lack of gloves worn by nurses aides when changing incontinent patients, Gaspard told Craft that gloves were not required by the State, that Respondent provided them as a convenience to the nurses aides, that providing them represented a cost to Respondent, and that what was really required was good hand washing techniques by aides, not gloves.

Problems about working conditions were expressed both individually and by employees collectively to both Gaspard and Supervisor Pfiffner. Employee Julia Boutte, for example, spoke to Pfiffner about working conditions at Respondent's facility on two separate occasions, once about employees having to "work short" and once about employees not having gloves. Boutte was also present when employee Maggie Craft spoke to Pfiffner on one occasion, and on another occasion when Craft and employee Regina Rocker spoke to Gaspard about the lack of pads and about the inadequacy of food served to patients. Gaspard did not perceive any need to take any corrective action as a result of the complaints, but rather informed the complaining employees that Respondent was meeting its obligations to both patients and employees.²

¹ At the time of the incident herein on June 1, 1981, Gaspard held the position of director of nurses. At the time of the trial herein Gaspard held the position of administrator and trainer.

² Whether or not there was any merit to the employees' complaints, and whether or not Gaspard's response was justifiable and/or reasonable is, of course, irrelevant to this proceeding.

C. Events of June 1, 1981

On June 1 seven nurses aides assigned to work in station 3 on the 3 p.m. to 11 p.m. shift reported as scheduled. At approximately 4:30 p.m., nurses aide Gatlin left work because she was not feeling well. After Gatlin left, at least four nurses aides, including Julia Boutte, Zelda Railey, Inez Boykin, and Janey Harvey helped to cover the section left open by Gatlin. I credit Railey, Boykin, and LPN Barbara Brooks that these employees provided this assistance on their own initiative and without being instructed or requested to do so either by Brooks or Pfiffner. This assistance was provided while the employees remained assigned to cover the section to which they had been assigned at the beginning of the shift.³ Boutte assisted in the open section by cleaning the patients, sitting them up in bed to be fed dinner, bringing them dinner, and feeding patients who needed help. Railey helped pass out dinner trays, while Boykin helped by feeding some of the patients in that section. Following dinner, Boutte picked up the trays in the open section and then returned to her own normally assigned section where she cleaned patients and then followed the same routine she had in the open section. When finished in their own sections, Boutte, Railey, Boykin, Rocker, and perhaps others took a break.

During the break, these employees began to complain among themselves about the fact that there was an open section and no substitute employee had been secured to cover it. Boutte told the other aides that she thought that she had done enough in the open section, that she had cleaned and fed the patients, and that she was not going to go back into that section. The other aides told Boutte they were not going to work in the open section because they had enough to do with their own patients, and they were tired of working short everytime someone did not come in or was off for some reason. After the break was over, these same employees were standing near the nurses station before returning to the sections to which they had been assigned at the beginning of the shift. According to Railey, who I credit, the aides then had a discussion in which they decided individually and collectively they were not going to work in the open section. According to Brooks, one or some of the aides, whose identity is not revealed, informed Brooks they were not going to work in that open section. According to

³ In view of my credibility resolution, I find it insignificant whether, in such circumstances, either Pfiffner or Brooks usually, or on this occasion, posted a new work assignment chart, assigning the remaining aides to cover different areas than those which they had been assigned at the beginning of the shift. Considerable testimony was devoted to the question of whether new work assignment charts were posted under such circumstances. Gaspard and Pfiffner testified that they were. Nurses aide Craft testified that she had never seen or heard of such charts being posted when the number of aides was reduced due to absences. Of all the witnesses, I consider Gaspard, Pfiffner, and Craft to be the least trustworthy. Pfiffner being the most unbelievable of the three. Considering all the evidence, particularly the testimony of Brooks, who is neither an alleged discriminatee nor still employed by Respondent, and whose testimony I consider to be the most believable, I conclude that actual practice was for any formal division or reassignment of work to be largely ignored by everyone, including supervision. In fact, employees tended to continue to cover their own normally assigned section and to pitch in as a team and help to cover the section left open by the absence.

Brooks, the aides informed her they were sick and tired of working under the existing conditions, and they wanted to speak to Mr. Gaspard. They also told Brooks that on numerous occasions they had filled in under such circumstances in order to help out Brooks, but that this was one time they were not going to do it. Brooks then informed Pfiffner of what she had been told by the aides. Pfiffner told Brooks to divide the section among the nurse aides who were there at work. Brooks went to the aides and proceeded to do so, but was again told they were not going to work in that open section. Brooks returned to tell Pfiffner of their position.

Pfiffner then went to the nurses desk herself and asked the aides to get to work. Pfiffner told the aides that, if they were not going to do it, she was going to have to call Gaspard. About that same moment, one of the patients, a Mrs. O'Connell, approached the nurses station in her wheel chair. O'Connell, one of the patients from the open section, asked Pfiffner and the assembled group of aides for help in being put to bed. Pfiffner addressed the group of aides, asking if one of them would help O'Connell.⁴ Aides who were assembled at the nurse's station at the time included Maggie Craft, Inez Boykin, Zelda Railey, Regina Rocker, and Julia Boutte. Craft replied to Pfiffner's question, telling Pfiffner that the aides were not going to work in the open section because they were tired of doing so and that she, Craft, was only going to take care of her own patients, all of whom had diarrhea.⁵ Boykin then told Pfiffner that she too was just going to take care of the patients in her own section. Pfiffner then asked the aides if one of them would at least help her put O'Connell to bed. One of the aides, Janey Harvey, agreed to do so. Brooks testified credibly that, after Harvey agreed to help Pfiffner, Pfiffner went and obtained rubber gloves for her and Harvey to use to clean O'Connell. After obtaining the gloves, and giving a pair to Harvey, Pfiffner went into the bathroom where she remained until Harvey finished putting O'Connell to bed. When the aides who remained at the nurses station saw that Pfiffner had obtained gloves, they became upset because one of their complaints about working conditions at Respondent's facility had been that gloves were not being made available to them.

After Harvey finished putting O'Connell to bed, Pfiffner returned to her own office. Although she knew Gaspard was out of town, Pfiffner telephoned Gaspard's home, ostensibly to seek moral support from Mrs. Gaspard. Mrs. Gaspard informed Pfiffner that Mr. Gaspard had just arrived home from his trip, and Pfiffner thus was able to speak to Gaspard. Pfiffner described to Gaspard what had taken place. Pfiffner concluded her description by telling Gaspard that the aides "were probably not going to do any more work." Gaspard told Pfiffner that if the aides would not volunteer to cover the open section, then Pfiffner should ask the LPN to

handle it for Pfiffner. Pfiffner then told Gaspard that she would transfer him to the nurse in charge, at which point Gaspard spoke to Brooks. Brooks explained the situation to Gaspard. According to Brooks, whom I credit, Gaspard told her to go out and get the nurses aides to go to work, and that if the aides did not want to go out and go to work for Brooks to write them up and send them home. While still on the phone with Gaspard, Brooks addressed the aides, informing them that Gaspard wanted them all to get together and work the open section. The aides told Brooks they would not do so.⁶ Brooks told Gaspard of their response. Gaspard then asked to speak to one of the employees. Railey got on the phone and spoke to Gaspard.

Gaspard asked Railey what was going on. Railey informed Gaspard there was an open section, the nurses aides were tired of working open sections, and they were not going to do it. Railey also told Gaspard that conditions were unsanitary because of the lack of gloves for aides to use when changing patients. Gaspard asked Railey if she would work the open section. Railey said no. Gaspard then told Railey to take her timecard, punch out, and go home. Gaspard told Railey that he was going to come into the home and talk with the aides. Railey returned the phone to Brooks and informed the other aides that Gaspard had said he was coming to the facility. Gaspard then asked Brooks if she had prepared written reprimands for the aides. Brooks informed Gaspard that Pfiffner was in the process of preparing them. Gaspard told Brooks to again tell the aides to get out there and go to work. According to Brooks, whom I credit, Gaspard told Brooks on this occasion that if the aides would not go to work, "Fire them, get rid of them."⁷ After she spoke to Gaspard the second time,

⁴ This is based on the credited testimony of Zelda Railey.

⁷ I specifically credit Brooks that in this telephone conversation Gaspard spoke of "firing" the aides. I do not credit Gaspard's denial. Nor do I credit Pfiffner's denial of Brooks' testimony based on Pfiffner's assertion that she listened in on the conversation between Gaspard and Brooks. This credibility resolution in favor of Brooks is based largely on the demeanor of the three witnesses. I had the distinct impression that any resemblance between Pfiffner's testimony and the truth was purely accidental. On cross-examination, Pfiffner was quite combative and argumentative with counsel. In general, she appeared to be a very biased witness. A good example of her obvious bias appeared at one point in her examination when her testimony conflicted in a relatively minor area with that of Gaspard regarding whether aides were permitted to congregate around the nurse's station when they were not actively engaged in patient care. When the possibility was pointed out to her in questioning that her testimony might differ from that of Gaspard on this point, Pfiffner attempted an about-face in order to align her testimony with Gaspard. From close observation of Gaspard, I concluded that his primary concern was with creating the appearance of attempting to tell the truth rather than with actually telling the truth. He appeared to be so concerned with creating the appearance of telling the truth that one is left doubting the substantive testimony itself. All in all, Brooks struck me as "telling it just like it was," without the least regard for who liked it and who did not.

In crediting Brooks that Gaspard told her to "fire" the aides if they would not work, I am mindful of the fact Brooks also testified a short time later that, after Gaspard arrived at the home, he told the aides they were "fired" and she then withdrew the later statement. In light of Brooks' testimony, and with particular regard for her demeanor, I view the change in Brooks' later testimony purely as an attempt to be as accurate in detail as possible. I have concluded below that when Gaspard later went to the home and confronted aides who were assembled at the

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⁴ My conclusion that any formal reassignment of work in station 3 was largely ignored by everyone, including supervision, is supported by Pfiffner's own actions in asking the group at large if someone would help O'Connell. A regular and formal division of that section would have resulted in Pfiffner addressing the aide who has been assigned to O'Connell.

⁵ This finding is based on the testimony of Boutte and Boykin, whom I credit.

Brooks approached the aides and told them Gaspard had said that if the aides did not work, they were to go home, "they were all fired." Brooks testified she told the aides, "Mr. Gaspard said that you got to work or you all are fired." Brooks testified that the aides responded they wanted to talk to Gaspard themselves and that Gaspard could not fire them over the telephone, that he had to give them pink slips. Brooks told the aides that Gaspard had said he would be at the facility in a few minutes, and the aides responded they were going to wait for Gaspard.

According to the credited testimony of both Railey and Brooks, several of the aides, including Railey, then left the nurses station and went back to the areas to which they had originally been assigned in order to check, and if necessary change, the patients and prepare them for bed. The aides then waited in a group at the nurses station until Gaspard arrived approximately 45 minutes later. It is clear from the credited testimony of Brooks that by the time Gaspard arrived, all or most of the aides had completed putting patients to bed for the night in the sections to which they were normally assigned, and that providing things ran as normal in those sections, they could expect to be called on simply to respond to the needs of the individual patients who might become incontinent in their sleep or who might request the assistance of an aide by using the call button at their beds. Things had become rather quiet for the night in all but the open section.⁸

Following Pfiffner's call to Gaspard, Gaspard came to the facility, arriving at approximately 9:30 p.m. Upon arriving, Gaspard went to the nurses desk at station 3. There he met LPN Brooks and aides Craft, Rocker, Railey, and Harvey. They were immediately joined by

nurses desk, he told them to either get to work or get their "tails" out of the building. Craft, whom I do not credit, and initially Brooks testified that Gaspard told the aides they were "fired." Brooks, after her initial testimony and while still on direct examination, then testified that Gaspard told the aides he wanted them off the premises, that she did not hear Gaspard use the word "fired." Brooks then repeated, "I heard him say he wanted them off the premises." I find this correction in Brooks' testimony to make her more, rather than less, believable. Interestingly, the change in her testimony also causes it to tend to be more corroborative of at least some other witnesses, and considering the fact that all of the witnesses were sequestered, this fact too tends to make her more believable.

⁸ The fact that after Gaspard spoke to Pfiffner, Railey, and Brooks on the telephone, the nurses aides nevertheless attended to the needs of patients in the areas to which they were normally assigned runs contrary to Respondent's claim that the aides engaged in willful disregard for the safety and health of patients in some way which should be given special significance in this case. Rather, aides attempted to complete their chores for the evening so that the patients would not suffer by the aides taking time to have a meeting with Gaspard to discuss their grievances.

Pfiffner claims that after putting O'Connell to bed, and even before she telephoned Gaspard, she asked the nurses aides at one point if they would at least take care of the patients in their own areas. According to Pfiffner, the aides replied they were not going to do anything. Pfiffner claims she then told the aides they were refusing to do their work, and that Pfiffner thought they should punch their timecards, go home, and come back the next day to "talk this over." Pfiffner claims one of the aides then said that Pfiffner could not make the aides leave the building. I find this testimony by Pfiffner to be incredible and totally unworthy of belief. It represents an obvious attempt by Pfiffner to cast the aides in the worst possible light and align her own testimony with Gaspard by parroting his testimony about statements he allegedly made to employees later in the evening.

aides Boykin and Boutte.⁹ Within a few minutes Pfiffner also joined the group, bringing with her the reprimands which she had prepared after her initial conversation with Gaspard. Addressing the group in general, Gaspard asked what was going on.¹⁰ Several of the aides standing nearby, identified by Gaspard as Rocker and Railey and unidentified by other witnesses, responded by telling Gaspard some of the employee complaints about conditions at Respondent's facility, including the lack of gloves, unsanitary conditions, and employees having to "work short." According to almost all witnesses, Gaspard inter-

⁹ This finding is based on testimony of Gaspard and Boutte. Gaspard recalled meeting Brooks, Rocker, Craft, and Railey. According to Gaspard, Boykin was on her way to a series of rooms, and Boutte had a towel in her hand which indicated to Gaspard that she was working. Gaspard did not mention Harvey. Boutte, however, recalled that those present included Brooks, Craft, Rocker, Boykin, Railey, Harvey, and herself. I, therefore, conclude that the other individuals were already present when Gaspard arrived, and they were joined by Boykin and Boutte. I discredit Craft's claim that she was not present when Gaspard arrived but was in the bathroom. Both Gaspard and Boutte place Craft at the nurses station, and I so conclude.

Gaspard attempts to make some point of the fact that aides were already assembled at the nurses desk when he arrived, claiming that aides were not permitted to generally station themselves near the desk even when there were no patients requiring immediate care. Respondent would apparently have me infer from their presence at the desk either that the aides were thereby engaged in some conduct which itself warranted disciplinary action or that their presence evidenced an ongoing work stoppage which was already in progress. I do not believe the facts warrant such an inference. First, I note Gaspard himself admitted that stationing themselves near the nurses desk was a common practice for aides at times in the past, and as late as June 1981. Second, Boutte, Craft, and Brooks all testified that it was common for aides to station themselves near the nurses desk at night when the aides were not actively engaged in patient care. In fact, Brooks, a credible witness, testified, "they always did." As Brooks explained, the aides could see all the lights in the hallway above patients' doors from her desk and could also hear the call bell and telephone. Brooks testified she never instructed the aides they were not allowed to do so, nor was she told to so inform the aides. Even Pfiffner confirmed that it was not unusual for nurses aides to gather around the nurses station during their shift. As previously noted, when confronted with the fact that her testimony might conflict with that of Gaspard, she then claimed the nurses aides had no business hanging around the nurses station during their shift. As previously noted, when confronted with the fact that her testimony might conflict with that of Gaspard, she then claimed the nurses aides had no business hanging around the nurses station. I credit Brooks, find that it was common for aides to assemble near the nurses desk when not involved in immediate patient care, and refuse to draw any significant inference as it relates to this case from the fact that aides were assembled near the nurses desk when Gaspard arrived.

¹⁰ The ensuing events were testified to by no less than eight witnesses, including Gaspard, Craft, Boutte, Railey, Rocker, Boykin, Pfiffner, and Brooks. As is to be expected, the testimony of no two witnesses was entirely consistent. To a significant extent, therefore, my conclusions regarding these events necessarily represents a composite of the testimony of all witnesses. With regard to certain matters, the testimony of some witnesses is rejected on certain points, even though it is corroborated by other witnesses, because I find the testimony of still different witnesses to be more probable and logical with regard to those points. I shall attempt, within reason, to identify herein the particular testimony of the specific witness on whom I rely in basing my conclusions, as well as attempt to point out the extent to which that testimony is corroborated by other witnesses. It has also been necessary to reconstruct the order in which things were said because each of the witnesses recalls some, but not all, of the conversation. In reconstructing the order of the conversations, I relied to a considerable extent on overlapping testimony with regard to certain statements that were made. To some extent reconstruction was necessarily the result of what I consider to involve a certain inherent logic and probability about the order of those conversations, in light of the credited testimony.

rupted what was being said to him and, addressing the group at large, stated, "either go back to work or get your tails out."¹¹ According to Boykin, whom I credit, Craft responded to Gaspard by saying, "Mr. Gaspard, that's no way to talk to us ladies." Gaspard replied, "I am the boss, I can talk to you any way I want to. Go punch out."¹² Employees then asked Gaspard why they had to punch out since they were doing their work. Gaspard replied that he wanted them to punch out just because that's what he wanted. I credit Boykin that at that point the employees asked repeatedly if they had been fired and, as Boykin put it, Gaspard "kept saying no, he just wanted us to go home." At least one, and perhaps several, of the aides responded to Gaspard saying they did not want to leave, they just wanted to talk to him about conditions at the home.¹³ Gaspard replied by saying he did not want to listen to anything the employees had to say, that what he says goes.¹⁴ One or more of the aides again said they did not want to leave, they only wanted to talk to Gaspard. Boutte then asked Gaspard, "Well, if you're firing us, why? What is the reason?" Gaspard replied he did not have to give a reason. Boutte then said, "Well, if you're going to fire us, at least give us a pink slip." Gaspard replied either that he could give employees the pink slip anytime he wanted or that he had a certain number of hours within which to do so.¹⁵

¹¹ Craft, Railey, Rucker, Boykin, and Gaspard himself all agree that he told the aides to get their "tails" out. Brooks tends to corroborate this, but testified that Gaspard used the word "asses" rather than "tails." Respondent and Gaspard in his testimony attempt to make much of some difference between the two terms, Gaspard professing that the former is not a part of his vocabulary. Respondent would apparently have me make some significant credibility resolution regarding Brooks' testimony as a result of this inaccuracy on her part. I decline to do so, if for no other reason than because the two terms are largely interchangeable in colloquial speech and are not generally considered to have the significant distinction perceived by Gaspard.

Several witnesses, including Craft, Boutte, and Brooks all testified that Gaspard told the aides they were or would be "fired." Gaspard, Pfiffner, and significantly Boykin testified that Gaspard specifically told the aides at some point they were not fired. Having weighed all of the evidence, I have concluded that at this point in the conversation, Gaspard did not specifically say that the aides were fired. Rather, at this point, Gaspard only told the aides to go back to work "or get your tails out."

¹² This statement is very similar to a statement also attributed to Gaspard by Brooks. I view Brooks' testimony as substantially corroborating Boykin, and choose Boykin's precise wording and timing because it appears to fit more logically in the sequence of events.

¹³ The fact that this statement was made is testified to by Craft, Boutte, Rucker, and Brooks. Gaspard testified that he could not recall the statement, but does not deny it.

¹⁴ This statement, like the preceding one, is recalled by Craft, Boutte, Rucker, and Brooks, whose testimony I credit.

¹⁵ Boutte, Railey, Boykin, Brooks, and Gaspard all agree that Boutte asked for a pink slip if she was being fired. Gaspard testified he again told the aides they were not being fired. Boutte and Railey agree that Gaspard replied employees would get their pink slips when he was ready or at a later time when it was convenient for him. Brooks testified that Gaspard replied he had 48 hours within which to give employees their pink slips. Boykin and Craft both testified that Gaspard replied he had 72 hours. Based on the testimony of Boutte, Railey, Brooks, Boykin, and Craft, I find that Gaspard did not reply to Boutte's question by repeating that employees were not fired. In making this finding, I am fully aware that the factual version which I have credited presents Gaspard as having contradicted, at least by inference, his earlier statements that employees were not being fired. This finding, however, is consistent with the testimony of Boykin who is the same aide that testified Gaspard had earlier said the aides were not fired. I find Boykin's testimony most reliable on this point and believe Gaspard's apparent inconsistency was the very

Gaspard then told the aides again to get their timecards, punch out, and go home, that he was the boss and he wanted them off the premises. Gaspard then turned to Brooks and said, "You, I want more supervision out of you. And if I can't get it, I can get somebody else to do the job." Gaspard then turned to Pfiffner and said, "And from now on I want eight people on this hall. And furthermore, I don't have to have eight people to run this hall." One or more of the aides then stated that they wanted to talk to Gaspard and they were not going to leave. At that point, Gaspard walked away from the group and went to the timeclock where he himself picked up the aides' timecards. Gaspard then returned to the nurses desk.¹⁶

All witnesses agree that, when Gaspard returned with the timecards, he laid the timecards on the table and then directed the employees to either return to work or punch out. Gaspard testified he then observed that the situation had become "inflamed" and consequently told the aides, who had made no movement in the direction of returning to work, that if this were going to be the situation, they should go home and they could all continue the discussion in the morning when it could all be reviewed and the personalities could be straightened out. According to Gaspard, Craft responded, "We're not going to do anything." Gaspard testified that as this discussion was taking place with the aides, he observed that patient lights had been illuminated above the doors of several patients, indicating they needed assistance from the aides. According to Gaspard, when the aides made no movement toward returning to work or toward leaving the facility, Gaspard left the nurses desk and went to call police to evict the aides from Respondent's premises. Pfiffner's testimony generally corroborates that of Gaspard.

Craft denies telling Gaspard that the aides were not going to do anything. In addition, Gaspard's claim that he mentioned the possibility of employees returning the next day in order to continue discussions is denied by Boutte, Railey, Rucker, Boykin, and Brooks. Similarly, they deny that any patient call lights came on during the confrontation with Gaspard. All of them were sequestered witnesses, and I am impressed by the fact that their testimony is substantially similar in content, while differing somewhat in detail. In particular, the testimony of Railey, Rucker, and Craft is strikingly similar, and I draw my conclusions regarding this discussion between Gaspard and the aides which took place at the nurses desk after Gaspard got the timecards on a composite of their testimony. Accordingly, I find that Gaspard did not suggest the employees leave and return the next day.

reason for the aides later refusing to punch out their timecards and leave the premises.

¹⁶ While on the way to and on returning from the timeclock, Gaspard had an encounter with an employee named Darlene Leavell which resulted in her also being discharged that night. Leavell worked in Respondent's laundry room. Leavell's statements to and actions toward Gaspard were clearly insubordinate and unprotected. She is not named in the complaint as an alleged discriminatee. Similarly, it is clear that Gaspard did not attribute either her statements or actions to the aides, and they did not play any part in the reason for the aides being discharged. Hence, it is unnecessary to discuss them in any detail or make any findings with regard to them.

Rather, when Gaspard laid the timecards on the table and directed employees to either return to work or punch out, Craft responded, "We don't want to go home. We just want to talk to you about the working conditions." According to Railey, Gaspard then "flew off the handle," and according to both her and Rocker, Gaspard then told the employees once more to punch out and go home. I credit Rocker that the aides then just stood there, without making any movement toward either returning to work or leaving. It was then that Gaspard left and telephoned police.¹⁷

When Gaspard returned with two policemen, the police asked employees what was going on. Craft, Rocker, and perhaps other employees then began to tell the police what had transpired. Among the things they told police were about unsatisfactory conditions at Respondent's facility and the fact that they wanted to sit down as a group and talk to Gaspard about these matters, and did not want to leave the home.¹⁸ The police then asked employees to leave. I credit Railey that in response to this initial request, Craft and Boutte both asked for their checks and their pink slips. The police responded that employees did not get pink slips with their checks unless they were fired. Railey and Boykin both testified that employees then asked Gaspard if they were fired. I credit Boykin that at this time Gaspard replied, "No, I just want you to go home."¹⁹ The employees, individually or collectively, responded that they did not have pink slips and did not want to leave without them.²⁰ The police then told employees that Gaspard wanted them to leave, that they should do so, and that if they refused to leave the police would have to take them to jail. According to both Boykin and Rocker, the police told employees that their problem involved a labor dis-

pute in which the police did not want to become involved, and they suggested that employees go home and come back at a later time to talk to Gaspard. According to Craft, Railey, and Rocker, whom I credit, the police also suggested the possibility that employees contact the Labor Board. Employees then asked Gaspard again if they had been fired. I credit Boykin that on this occasion, Gaspard replied yes—that employees were fired.²¹ The police then reiterated to employees that they would have to leave Respondent's facility, and employees did so.²²

After June 1, Ray White, hospital administrator, met with Gaspard, Pfiffner, and individually with Craft, Rocker, Boykin, Railey, and Boutte to discuss the events of that evening. Thereafter, by letters dated June 11, 1981, White notified employees that he concurred with their discharge by Gaspard on June 1.

III. ANALYSIS AND CONCLUSIONS

It will perhaps always remain a mystery why Gaspard vacillated and changed his mind several times on the evening of June 1 about the form of discipline to be imposed against aides for their actions. Gaspard asserts that throughout the evening of June 1 he consistently maintained employees were not fired, and he changed that position only because the police told him they could not escort employees off the premises unless employees were fired. I do not credit Gaspard that police made such a statement. I do not believe that the police can be blamed for Gaspard's inconsistent actions on the night of June 1. Perhaps the only fact which is undisputed in this case is that as soon as Gaspard learned aides were collectively refusing to work in the open section, he decided to take some form of punitive action against them. Gaspard directed Brooks to prepare written reprimands to the aides. Supervisor Pfiffner had already prepared such reprimands by the time Gaspard arrived at the facility on the evening of June 1. I credit Brooks that in the telephone conversation with Gaspard, in addition to directing her to prepare written reprimands for the aides, Gaspard told Brooks that if the aides refused to work in the open section, she was to "fire them, get rid of them." Based on

¹⁷ Part of my reason for crediting their testimony over that of Gaspard and Pfiffner is because of Gaspard's and Pfiffner's demeanor, on which I have commented above. Part of the reason is also because Gaspard's testimony on this point is inconsistent and self-contradictory. For example, at one point Gaspard testified that he told the aides, if they were not going to go back to work, "why didn't they continue discussion the next morning, when personalities could be discussed, they could straighten out the personalities and get it all reviewed in the morning." Later, Gaspard testified he told the aides that if they did go back to work, they could go home and resolve the personality conflicts the next day. Still later, Gaspard testified that, when he went to get the timecards, neither Boykin nor Boutte was standing with the other employees. When he returned and told the employees to either work or punch out, Boutte told Gaspard she was not leaving unless she had a pink slip. Gaspard asserted it was at that time he responded, "You're not fired. Go home and we will get the personalities worked out." Thus, Gaspard's testimony is riddled with different versions of when he assertedly told employees to go home and return the next day that I do not believe he ever made that remark. Rather, I credit employee witnesses and find that he did not. I find below, as testified to by Craft, Rocker, and Boykin, that it was the police who suggested the possibility that employees leave and return at a later time to pursue their discussion with management.

¹⁸ This finding is based on a composite of the testimony of Gaspard, and more particularly Rocker. Rocker and Gaspard agree that employees tried to tell police about conditions at the facility and what had been transpiring. I credit Rocker that employees told police they did not want to leave, rather than Gaspard who asserts that Craft stated employees were not going to do anything and were not going to leave.

¹⁹ In her direct testimony, Railey at first testified that Gaspard responded that employees were fired. She readily admitted on cross-examination, however, that at some point during this final discussion Gaspard stated, "I just want you to go home." In its totality, therefore, Railey's testimony tends to be very similar to that of Boykin.

²⁰ This finding is based on the testimony of Boykin.

²¹ Gaspard himself testifies that he finally told the employees they were fired. Gaspard admits he told the employees that if they were not going to return to work, he was going to fire them. The essence of Gaspard's testimony is that he finally told employees they were fired because the police told him in front of employees that the police could not escort employees off the premises unless they were fired. I do not credit Gaspard that police made such a statement. For the reasons explained below, I do not believe the police can be blamed for Gaspard's inconsistent statements in telling employees at times that they were not fired and at other times that they were fired. Rather, I conclude that the inconsistency emanated from Gaspard himself.

²² I find it unnecessary to discuss any of the statements or comments which might have been made either by Leavell or by any of the alleged discriminatees herein as they were leaving the facility. Statements made by Leavell were not attributed by Respondent, and are not attributable by me, to the alleged discriminatees herein, and are, therefore, irrelevant. Gaspard admits that statements made by the alleged discriminatees to the effect that God would punish him for his actions were misunderstood by him at the time to be threats. Inasmuch as Gaspard now admits that he misunderstood the comments, and does not consider them as threats, I find it unnecessary to discuss them or to make any specific findings with regard to them.

these statements by Gaspard to Brooks, Brooks thereafter repeating those statements to the aides, and Gaspard's own statements to the aides to either get back to work or get their "tails" out of the building, I conclude that the aides reasonably believed that their employment with Respondent had terminated.

In an obviously conciliatory tone, the aides told Gaspard they only wanted to talk to him about working conditions at Respondent's facility. Gaspard, however, expressly refused to listen to anything the aides wanted to say. Gaspard left the aides with only two options, returning to work or punching out on the timeclock. The aides had decided they were not going to go back to work without first getting a chance to meet and discuss their complaints with Gaspard. From all the evidence, I conclude that the employees, and perhaps Gaspard himself, saw the latter option of employees punching out as a trick on Gaspard's part to get the employees to evidence a voluntary quit. After having already been told by Brooks himself to "get their tails out" of the building, when Gaspard told them to punch out their timecards, the employees asked Gaspard if they had been fired. Gaspard said no, that he just wanted them to go home. Employees then tried again to tell Gaspard that they only wanted to talk to him. Gaspard, however, refused again, pointing out that he was boss. Moments later, however, when aide Boutte again asked if employees were being fired and why, Gaspard replied he did not have to give a reason. By this time, the fact that Gaspard was vacillating must have been obvious to everyone. Boutte then requested she be given a termination slip, and this request was denied.

Gaspard then proceeded to get the employees' timecards himself, bring them back to where the aides were standing, and insist that the aides themselves pick up the timecards and punch out. At that moment, the controversy between the aides and Gaspard boiled down to who was going to physically punch out the employees' timecards. It was Gaspard who framed the controversy in that context. Gaspard never suggested that employees simply go home and he would clock them out or have them clocked out. Nor did he clock out the employees when he went to get the timecards as he easily could have done. Instead, he brought the timecards back to the nurses desk and demanded that employees themselves clock out. The evidence here leads me to the conclusion that employees neither harbored nor evidenced any desire to seize control or occupy Respondent's premises to protest working conditions. Rather, I am convinced that to the extent employees refused to vacate Respondent's premises, it was the result of the confusion caused by Gaspard himself at times saying that employees were fired and at other times saying that they were not fired, and then demanding that employees themselves pick up their timecards and punch out. Once the initial decision had been made by Gaspard to take punitive action against the aides for collectively refusing to work in the open section, all of the later events which occurred were a mere extension or consequence of that decision. Gaspard's own inconsistency created the confusion on the evening of June 1. Respondent now attempts to benefit from that confusion by arguing that the reaction of em-

ployees to it constituted an unlawful and unwarranted takeover of Respondent's premises.

The kind of employee conduct present in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), and which brought the Board and the Seventh Circuit to different conclusions in *Advance Industries Division*, 220 NLRB 431 (1975), enf. denied in relevant part 540 F.2d 878 (7th Cir. 1976), is not present in the instant case. Both of those cases, as well as all of the other cases relied on by Respondent which are cited and discussed in the court's decision in *Advance Industries*, involved a conscious takeover of employer premises as an integral part of the employee protest, sometimes for days, as was the case in *Fansteel*, and sometimes for less than an hour, as was the case in *Advance Industries*. That element of a conscious takeover of employer property was even present in *NLRB v. Pepsi-Cola Bottling Co. of Miami*, 449 F.2d 824 (5th Cir. 1971), wherein the Fifth Circuit agreed with the Board that the employee conduct was not unprotected and that the discharge of employees was unlawful. In the instant case, however, I conclude that to the extent employees refused to vacate the Respondent's premises on June 1, it was solely the result of the confusion created by Gaspard's vacillating and inconsistent statements. I reject Respondent's attempt to benefit from the confusion which it itself created.

Respondent's argument that by refusing to work in the open section employees were engaged in a partial, and thus unprotected, work stoppage has some initial appeal, but on analyses is shown to be too mechanical and simplistic. The underpinnings of such an argument are that unless there is some specific limitation on Respondent, employees are expected to perform whatever duties they may be assigned, and any refusal to perform a specific assigned task constitutes a partial, and thus unprotected, work stoppage. Respondent attempts to enhance that argument here by further arguing that prior to June 1, nurses aides had been called on from time to time to perform duties in sections left open by an absent aide. Respondent carries the argument one step further, asserting that when an aide was absent, thereby creating an open section, the entire area was divided and reassigned among the aides on hand. Thus Respondent argues, by refusing to work in the open section on June 1, aides were refusing to perform part of the duties normally assigned to and expected of them. This argument, however, is too mechanical and simplistic for it ignores reality at Respondent's facility on a day-to-day basis. As I have found above, when an open section resulted from an aide's absence, other aides regularly pitched in voluntarily as a team and helped to cover the section left open by the absence. This was usually done on the aides' initiative and without being instructed or requested to do so either by the LPN or the supervisor. If in fact a new work assignment was posted, that assignment was largely ignored by everyone, including supervision. In fact, employees regularly continued to cover their own normally assigned section while pitching in to help cover the open section. This practice was well known to and accepted as standard practice by Pfiffner. Further, no matter how one analyzes what was normally expected of aides, the

fact is that an open section resulting from an absent aide resulted in extra work for the other aides than they normally were required to perform. It was this extra work which employees refused to perform on June 1. In similar cases, the Board has recognized that the refusal to perform extra work is not the same as a partial work stoppage. *Marlene Industries*, 255 NLRB 1446 (1981). Accordingly, I find that by refusing to assume extra duties and responsibilities in the section left open by the absence of an aide on June 1, the remaining aides were not engaged in a partial work stoppage but rather were engaged in concerted activity which warrants the protection of the Act.

Respondent also argues that the protest of working conditions by employees herein should be found to be unprotected because Respondent maintained its own grievance procedure which employees could have utilized to protest working conditions rather than refuse to perform duties demanded of them by Respondent. In support of this argument, Respondent again relies on the decision of the circuit court in *Advance Industries*. In that same case, the Board held, "[T]he existence of a grievance procedure unilaterally established by Respondent does not provide a sufficient basis for denying the protection of the Act to . . . employees." If there was a direct conflict between Board and circuit decisions, I would of course be bound to follow Board precedent. However, the evidence here reflects that while on paper Respondent's grievance procedure would appear to be a formal one, no grievance forms were maintained or utilized. When Respondent was asked to explain how the grievance procedure worked, it was revealed that any employee suggestion or complaint, whether written or verbal, would be considered by Respondent as a grievance pursuant to that procedure. Hence, one could conclude that the numerous instances of employee complaints prior to June 1, which ultimately lead to the events of that day, were themselves grievances processed pursuant to that procedure. The procedure having been exhausted, further concerted activity cannot in any event be said to be unprotected. One could just as easily conclude that the employees' concerted attempt to discuss complaints about working conditions with Gaspard was itself an attempt to process a grievance pursuant to that procedure, and Gaspard's refusal to discuss these matters with employees necessarily terminated that procedure.

Accordingly, whether or not the existence of such a unilaterally established procedure can preclude employees from engaging in concerted activity which would otherwise be protected by the Act, in the case at hand it would not change the conclusion that employee conduct was protected. Accordingly, I reject Respondent's argument that the existence of this procedure should result in a finding that the concerted activity of employees on the evening of June 1 is unprotected.

In conclusion, I find that Respondent discharged employees Craft, Rocker, Boykin, Railey, and Boutte because of their concerted attempts to air mutual complaints to Respondent about working conditions at its facility and that, by doing so, Respondent violated Section 8(a)(1) of the Act. *Marlene Industries*, supra; *Leisure Lodge Nursing Home*, 250 NLRB 912 (1980); *Pacific Convalescent Hospital*, 229 NLRB 507 (1977); *Walker Methodist Residence & Health Care Center*, 227 NLRB 1630 (1977); *Masonic & Eastern Star Home*, 206 NLRB 789 (1973).

CONCLUSIONS OF LAW

1. The Respondent, Audubon Health Care Center, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent discharged Maggie Craft, Regina Rocker, Inez Boykin, Zelda Railey, and Julia Boutte because of their having engaged in a concerted effort to air mutual complaints to Respondent about working conditions at its facility, and Respondent has thereby violated Section 8(a)(1) of the Act.

3. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]